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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189945

DATE: December 20, 1977

MATTER OF: Mule Battery Co., Inc.; Luxtron, Inc.

DIGEST:

1. Where protester fails to reply to report from agency denying protest, assumption is made that there is no desire to pursue protest.
2. Review of protest against affirmative determination of responsibility will not be made except in cases of fraud or misapplication of definitive responsibility criteria set forth in solicitation.
3. Where original specification requirement is amended to permit certification rather than evidence of satisfactory operation and life expectancy of item, failure of low bidder to comply with requirement has not been demonstrated. Further, since requirement need be complied with only after award of contract, matter is one of contract administration.

The Mule Battery Co., Inc. (Mule), protests any award under General Services Administration invitation for bids No. 3FP2-S5-R-4185-8-17-77 to either Sure-Lites, Inc., whose prices bid indicate to Mule that the firm cannot supply an item meeting the specification, or to the Lightalarms Electronics Corporation (Lightalarms), on the bases that its offered item will not meet the specification and that the manufacturer of the item has not, as allegedly required by the Federal specification governing this procurement, manufactured the item for the requisite number of years. Luxtron, Inc., also protests any award to either Sure-Lites or to Lightalarms, among others, on the basis that neither will supply an item meeting the specification.

First, as regards the protest against any award to Sure-Lites, due to a mistake made in the computation of bid prices that firm was permitted to withdraw its bid. Since no award will be made to Sure-Lites, we see no reason to consider this portion of the protest.

Second, regarding the allegation that any item that Lightalarms will supply will not meet the specification, we note that Luxtron has in no manner replied, as it was advised it must, to our Office regarding the GSA report recommending denial of its protest, and we must, therefore, assume that it does not desire to pursue the protest. However, since Mule has raised the essentially same issue we will consider the issue as raised by Mule. We note in this respect that the issue of the responsiveness of the Lightalarms bid is not in question. Insertion of model numbers was not required in the invitation. Only prices for the item which had to meet the applicable Federal specification had to be submitted. By submitting a signed bid each bidder obligated itself to deliver items which conformed to the applicable Federal specification. Consequently, the question is one of bidder responsibility--whether Lightalarms has the capability to produce the item in question. The contracting officer has determined Lightalarms to be a responsible bidder.

As regards this issue, our Office has discontinued the practice of reviewing bid protests involving a contracting officer's affirmative determination of the responsibility of a contractor except in cases involving actions by procurement officials which are tantamount to fraud, or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Since the responsibility of Lightalarms has not been challenged on either of these bases, we will not review this matter.

Third, regarding the issue of the alleged 8-year manufacturing requirement, we note that this requirement was amended in the invitation so that:

"In lieu of providing evidence of satisfactory operation [for 8 years] and life expectancy [at least 10 years], the battery manufacturer or contractor may provide a certificate of compliance indicating that battery will operate satisfactorily for the above period, having the life expectancy indicated."

It would thus appear that the manufacturer could comply with the requirement by simply certifying that the item will operate for the period required. Mule has not alleged that such a certification has not or cannot be made. In any event, Lightalarms, in effect, claims that its offered item complies with the specification even disregarding the amendment. The invitation provision imposes the obligation to furnish

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either the evidence or the certification on the contractor rather than the bidder. We conclude, therefore, that the material need not be submitted prior to award. We assume the requirement will be enforced as a matter of contract administration.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States